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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 128.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

VS.

JOHN H. THERRELL, ALSO KNOWN AS J. H. THERRELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

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INDEX

Question Presented 1

Statutes and Regulations Involved 2

Statement of the Case 2

Summary of Argument 2

Argument—

I. Respondent was an officer or employee of the State of Florida 3

II. The respondent was engaged in an essential governmental function 12

III. The source of the compensation of respondent is immaterial 17

IV. Article 643 of Treasury Regulations 74 and Article 643 of Treasury Regulations 77 show administrative recognition of the respondent's contention 23

Conclusion 24

Appendix 25

CITATIONS

Cases:

Ambrosini vs. United States, 187 U. S. 1 ..... 19, 21

Amos vs. Trust Company of Florida, 54 F. (2d) 123 5

Augusta Bank vs. Earle, 13 Pet. 519 13

Auten vs. U. S. Nat'l Bank of N. Y., 174 U. S. 125 6

Brush vs. Com'r of Internal Revenue, 300 U. S. 352 20

Burnet vs. Coronado Oil & Gas Co., 285 U. S. 393 19

Chavous vs. Gornto, 89 Fla. 12, 102 So. 755 10

Chetwood, Ex parte, 165 U. S. 443 6

Choctow O. & G. R. Co. vs. Harrison, 235 U. S. 292 21

Collector vs. Day, 11 Wall. 113 20
Com'r of Internal Revenue vs. Ten Eyck, 76 F. (2d) 515 23
Crenshaw vs. Ullman, 20 S. W. 1077 9
Dobbins vs. Erie County, 16 Pet. 435 21
Fla. Bank & Trust Co. vs. Yaffey, 101 Fla. 653 5
Gayle vs. Missouri Car & F'dry Co., 76 S. W. 987 9
Gillespie vs. Oklahoma, 257 U. S. 501 21
Indiana Iron Co. vs. Cray, 48 N. E. 803 9
Indian Motorcycle Co. vs. U. S. of A., 283 U. S. 570 18
Kennedy vs. Gibson, 8 Wall. 498 10
Mallory vs. White, 8 Fed. Supp. 989 22
M'Culloch vs. Maryland, 4 Wheat. 316 12
McLoughlin vs. Com'r of Revenue, 89 F. (2d) 699 22
Metcalf & Eddy vs. Mitchell, 269 U. S. 514 ..... 8, 21
Nance vs. Hemphill, 1 Ala. 551 13
Noble State Bank vs. Haskill, 219 U. S. 104 14
Norfolk & W. Ry. vs. Stevens Admr., 34 S. E. 525 9
Ohio L. Ins., etc., Co. vs. Merchants' Ins. Co., 11 Humph. (Tenn.) 1 13
People vs. Bartow, 6 Cow. (N. Y.) 290 13
People of N. Y. vs. Graves, 299 U. S. 401 22
People vs. Orange Co. Rd. Const. Co., 67 N. E. 129 9
People vs. Utica Ins. Co., 2 Johns. (N. Y.) 371 13
People vs. Utica Ins. Co., 15 Johns. (N. Y.) 358 13
Perkins vs. Smith, 116 N. Y. 441 13
Pollock vs. Farmers' L. & T. Co., 157 U. S. 429 ..... 20, 21
Smith vs. Simmons, 103 Pa. 32, 49 Am. St. Rep. 113 9
State vs. Stebbins, 1 Stew. (Ala.) 299 13
State vs. Williams, 8 Tex. 255 13
Therrell vs. Rinaman, 107 Fla. 110 5

United States vs. B. & O. R. Co., 17 Wall. 322 21
United States vs. Weitzel, 246 U. S. 533 ..... 6, 11
Weston vs. Charleston, 2 Pet. 449 20
Western U. Tel. Co. vs. Tex., 105 U. S. 460 18
Waters vs. Pioneer Fuel Co., 52 Minn. 474, 38 Am. St. Rep. 564 9

Federal Statutes:

National Banking Act:
Sec. 191, U. S. C. A., Title 12 28
Sec. 192, U. S. C. A., Title 12 ..... 4, 29

Florida Statutes:

Compiled General Laws
Sec. 235 ..... 11, 29
Sec. 4867 32

Compiled General Laws Supp.
Sec. 6100 ..... 21, 30
Sec. 6101 ..... 21, 31

Laws of 1929, c. 13576:
Sec. 19 ..... 3, 4, 27
Sec. 21 ..... 4, 28
Sec. 23 ..... 4, 28

Revised General Statutes, Sec. 4159 11

Miscellaneous:

American and English Ann. Cases, Vol. 10, p. 903 13
American Jurisprudence, Vol. 7, Pars. 9 and 14 ..... 13, 14
Words and Phrases, First Ser., Vol. 4, p. 3542 8

Regulations 74:
Art. 643 23

Regulations 77:
Art. 643 23

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

QUESTION PRESENTED.

Is the Compensation Received by the Respondent As Liquidator of Certain Florida State Banks, and Paid from Funds in the State Treasury Realized from Liquidating the Assets of Said Banks, Subject to Federal Taxation?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set forth in the appendix, *infra*, pages 25-33.

STATEMENT OF THE CASE.

We believe that the statement as set forth in the brief of the petitioner is substantially correct.

SUMMARY OF ARGUMENT.

The argument will be divided into four subheadings, namely:

I. Respondent was an officer or employee of the State of Florida;

II. The respondent was engaged in an essential governmental function;

III. The source of the compensation of respondent is immaterial;

IV. Article 643 of Treasury Regulations 74 and Article 643 of Treasury Regulations 77 show administrative recognition of the respondent's contention.

ARGUMENT.

I.

Respondent Was an Officer or Employee of the State of Florida.

Section 19 of Chapter 13576 of the General Laws of Florida (1929) provides, among other things:

> "On becoming satisfied, from the reports furnished to him by a State Bank Examiner, or upon other satisfactory evidence thereof, that any bank * * *, doing business in this State under the State laws, has become insolvent and is in default * * *, the State Comptroller may in his discretion forthwith designate and appoint a liquidator to take charge of the assets and affairs of such bank, and require of him such bond and security as the Comptroller deems proper * * *, and such liquidator shall be subject to dismissal by the Comptroller, whenever in his judgment such dismissal is deemed necessary or advisable; when one liquidator is dismissed, another may be duly designated and appointed. Such liquidator, under the direction and supervision of the Comptroller, shall take possession of the books, [illegible]s and assets of every description of such bank * * *, and in his name shall sue for and collect all debts, dues and claims belonging to it, and upon the order of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such bank, * * * on such terms as the court shall direct; * * *. Such liquidator shall pay all money received by him to the State Treasurer to be held as a special deposit for the use and benefit of the creditors, subject to the order of the Comptroller, and shall also make quar-

terly reports to or when called upon, to the Comptroller of all his acts and proceedings."

Section 21 of Chapter 13576, General Laws of Florida (1929), provides, among other things:

> "All expenses of any liquidator shall be paid out of the assets of such bank, banker, banking firm, banking or trust company, or corporation before distribution of the proceeds thereof. The compensation of the liquidator shall be fixed by the Comptroller, and shall be based upon the amount of work actually done and performed, and shall in no case exceed five per cent of the cash collections."

Section 23 of Chapter 13576, General Laws of Florida (1929), provides:

> "The provisions of this Act shall apply to all receivers of any bank, banking firm, or banking or trust company, heretofore appointed by the order of any circuit court, and all such receivers, both these hereunder and those heretofore appointed by the circuit court, shall at all times be under the supervision and control of the Comptroller, and subject at all times to summary discharge and dismissal by him, and any vacancy in such receivership may be filled by the Comptroller at any time."

This court will note that the duties of a liquidator of a Florida state bank are almost identical with the duties of a receiver of a national bank; the wording of the Florida statute, Section 19, Chapter 12576, (*supra*) is practically identical with the wording of the National Bank Act, Section 192, U. S. C. A., Title 12, insofar as the duties of a Florida bank liquidator and a receiver of a national bank, respectively, are set forth.

The Supreme Court of the State of Florida has termed the liquidator an executive official or functionary of the state. In the case of *Therrell* v. *Rinaman*, 107 Fla. 110, 144 So. 327 (see page 329 of the Opinion), the Florida Supreme Court says:

> "The liquidator, whom the comptroller is authorized by the statute to appoint, is an executive creature of the legislative enactment, and can exercise only such powers as those with which, by force of the statute, he is expressly or impliedly vested. To put it another way, the comptroller and his statutory liquidators are executive officials or functionaries of the state, and neither is an officer of the court, which latter is required to adjudicate the fact of the bank's insolvency by confirming the comptroller's initial act of taking possession and control."

Again in the case of *Florida Bank & Trust Company* v. *Yaffey*, 101 Fla. 653, 136 So. 399, the Florida Supreme Court holds:

> "A bank liquidator of this state, under the statute provided for his appointment and controlling his duties, is a representative and agent of the comptroller and is not an officer of the court."

The Fifth Circuit Court of Appeals, in *Amos* v. *Trust Company of Florida*, 54 F. (2d) 123, comments upon the similarity of a Florida bank liquidator and the receiver of a national bank:

> "Like the receiver of a national bank, the liquidator, though confirmed by a court, is not an officer of the court but the representative of the comptroller."

This Honorable Court has held the receiver of a national bank to be an officer of the United States. We quote from a portion of the decision in the case of *Auten* v. *United States National Bank of New York*, 174 U. S. 125:

> "To sustain the motion to dismiss, it is contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the circuit court of appeals is final. But one of the defendants (plaintiff in error), though a citizen of a different state from the plaintiff in the action (defendant in error), is also a receiver of a national bank appointed by the comptroller of the currency and is an officer of the United States, and an action against him is one arising under the laws of the United States" (See page 140 of U. S. Rep. for this portion of opinion).

In *Ex parte Chetwood*, 165 U. S. 443, 458, this Honorable Court said:

> "The receiver was not the officer of any court, but the agent and officer of the United States."

Again, in *United States* v. *Weitzel*, 246 U. S. 533, 541, this court asserts the rule:

> "The receiver, unlike a president, director, cashier or teller, is an officer, not of the corporation, but of the United States. * * * As such he gives to the United States a bond for the faithful discharge of his duties; pays to the treasurer of the United States moneys collected; and makes to the comptroller reports of his acts and proceedings. * * * Being an officer of the United States he is represented in court by the United States Attorney for the district, subject to the supervision of the solicitor of the treasury. * * * And because he is such officer, a receiver has been permitted to sue in the federal

court regardless of citizenship or of the amount in controversy."

As previously stated, the duties of a liquidator under the Florida bank law and the duties of a receiver under the national bank act are practically identical. The Florida Supreme Court has termed the liquidator of a state bank an officer of the state, and this Honorable Court has termed the receiver of a national bank an officer of the United States.

It is true that neither takes an oath of office and neither holds office for a definite term. The policy of the State of Florida, as evidenced by statutes and judicial interpretation thereof is to designate a liquidator an officer of the state.

If a liquidator is not an officer of the state, he certainly is an employee; his duties are prescribed by statute, his compensation is fixed within certain limits by statute and he is under the supervision and control of the comptroller. In the supervision of banks by the State of Florida the liquidator is an indispensable officer or employee.

The Board of Tax Appeals ruled that the liquidator is an independent contractor. We do not think the rule sound, as the liquidator cannot enter into a contract with anyone; he certainly cannot enter into a contract with the stockholders or creditors of a state bank to liquidate the same; he cannot enter into a contract with the comptroller because the statute above mentioned defines the manner of his appointment, his duties and his compensation.

Probably no case is quoted more in controversies involving income tax than that of *Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514. The peculiar thing about it is that everyone who quotes from it seems to receive a great deal of satisfaction from said case. The Board of Tax Appeals quoted from it in support of its rule that the respondent was an independent contractor, the Commissioner in the court below also quoted from it; and we also wish to quote from it to show that a liquidator of a Florida bank is not an independent contractor according to the definition therein set forth (page 520):

> "Nor do the facts stated in the bill of exceptions establish that the plaintiffs were 'employees' within the meaning of the statute. So far as appears, they were in the position of independent contractors. The record does not reveal to what extent, if at all, their services were subject to the direction or control of the public board or officers engaging them. In each instance the performance of their contract involved the use of judgment and discretion on their part and they were required to use their best professional skill to bring about the desired result. This permitted to them liberty of action which excludes the idea of that control or right of control by the employer which characterizes the relation of employer and employee and differentiates the employee or servant from the independent contractor."

Other courts have defined an *independent contractor*. We quote from Words and Phrases, First Series, Vol. 4, page 3542:

> "An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his

work, and not as to the means by which it is accomplished. *Gayle* v. *Missouri Car & Foundry Co.*, (Mo.) 76 S. W. 987-992; *Crenshaw* v. *Ullman*, 20 S. W. 1077, 1078, 113 Mo. 633 (citing Thompson on Negligence).

"An independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of the work. *Waters* v. *Pioneer Fuel Co.*, 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564; *Indiana Iron Co.* v. *Cray*, 48 N. E. 803, 807, 19 Ind. App. 565.

"An independent contractor is one who contracts to perform the work at his own risk and cost, the workmen being his servants, and he, and not the person with whom he contracts, being liable for their misconduct. *People* v. *Orange County Road Const. Co.*, 67 N. E. 129, 130, 131, 175 N. Y. 84.

"An independent contractor is said to be one who undertakes to do specific pieces of work for other persons without submitting himself to their control in the details of the work, or one who renders the service in the course of an independent employment, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Waters* v. *Pioneer Fuel Co.*, 55 N. W. 52, 52 Minn. 474, 38 Am. St. Rep. 564; *Norfolk & W. Ry. Co.* v. *Stevens' Adm'r*, 34 S. E. 525, 526, 97 Va. 631, 46 L. R. A. 367.

"An independent contractor is one who contracts to perform service for another independent of the employer in all that pertains to the execution of the work, and who is subordinate to the employer only in effecting a result in accordance with the employer's design. *Smith* v. *Simmons*, 103 Pa. 32, 36, 49 Am. Rep. 113."

The wording of the Florida statute negatives any claim that the respondent is an independent contractor. The respondent, "under the direction and supervision of the comptroller," performed his duties, which certainly means that the comptroller supervised the manner in which he performed his duties. The respondent was employed to turn the assets of the closed banks into cash, but he was not free to do it in the manner he thought best but had to follow the comptroller's instructions as to the means employed. Under the Florida statutes, a liquidator of a closed bank cannot assess the stockholders on their statutory liability whenever he thinks it proper to do so, but must wait until directed by the comptroller.

In the case of *Chavous* v. *Gornto,* 89 Fla. 12, 102 So. 755, the Florida Supreme Court, quoting from the case of *Kennedy* v. *Gibson,* 8 Wall. 498, says:

> " 'The receiver is the instrument of the comptroller. He is appointed by the comptroller, and the power of appointment carries with it the power of removal. It is for the comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much, shall be collected. These questions are referred to his judgment and discretion, and his determination is conclusive.' "

The petitioner argues that the respondent was not an employee of the comptroller but rather a contractor who, after his appointment, had substantially the status which the bank whose affairs he was conducting had prior to its insolvency. This argument, we submit, is fallacious, as the respondent did not stand in the shoes

of the officers and directors of the bank prior to its insolvency. This Honorable Court, in *United States* v. *Weitzel* (*supra*), held that the receiver of a national bank was, unlike the president, director, cashier or teller, an officer, not of the corporation, but of the United States. In other words, the receiver represented the United States Government and was not an officer or employee of the insolvent bank.

Again the petitioner argues that because Section 4159 of Revised General Statutes provides that liquidators shall have their books examined the same as a solvent bank, that therefore the respondent is an independent contractor. By the same reasoning, the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, and all state officers, would be independent contractors because their books are audited under the direction of the state auditor.

Section 235, C. G. L., *infra*, p. 29, authorizes the governor of Florida to designate and direct any one or more of the state auditors to audit the office, books and records of any county, of any state or county officer, or of any state institution, board or commission.

Petitioner contends it was most unlikely that the comptroller supervised the respondent beyond directing him what to do, namely, liquidate the institutions. Regardless of what the comptroller did in the instant case, the law is clear that the respondent was under the supervision, direction and control of the comptroller, and the Board of Tax Appeals could not by its decision make the duties of the respondent and the supervision and control of the same contrary to the law of the State of Florida.

II.

The Respondent Was Engaged in an Essential Governmental Function

We doubt if anyone will seriously contend that the supervision of banking is not an essential governmental function.

In the early part of the nineteenth century, this Honorable Court, in the famous case of *M'Culloch* v. *The State of Maryland et al.*, 4 Wheat. 316, asserted that the United States had the constitutional right to incorporate a national bank and to establish branches within any state. This was one of the early cases which prohibited the state from taxing an instrumentality of the Federal Government. Since the above case was decided, the Congress of the United States has from time to time increased its supervision over and control of national banks. It is indispensable to our industry, trade and commerce that this governmental supervision and control be maintained and perhaps increased. The establishment of the Federal Reserve System was for the purpose of preventing panics and enabling our economic life to be maintained without the previous fluctuations of feast and famine. Undoubtedly, the Federal Reserve Act was of great assistance to the commercial life of this country, but the disruption of our banking system during the latter part of 1932 and the forepart of 1933, disclosed that the Federal Reserve Bank System by itself was not sufficient to accomplish the purposes sought. Therefore, Congress passed an act setting up a corporation to insure deposits in national banks; this was done to

strengthen the confidence of the depositors in the various financial institutions and thereby prevent a recurrence of the financial stringency existing during the forepart of 1933.

We are of the opinion that most state governments have recognized that supervision and control of state banks are necessary and essential functions of the state. This has been asserted by decisions from various state courts.

In American and English Annotated Cases, Vol. 10, page 903, is a note covering "State Regulations and Private Banking." We quote from the first paragraph thereof:

> "It seems to be uncontroverted that at common law the right of banking belonged to a citizen individually, and might be exercised by him at pleasure. However, while this is true, the decisions generally recognize the right of the legislature to control and regulate the business of banking, on the theory that under the police power the state may legislate for the protection of its citizens; but until restrained or controlled by legislation the right to engage in the business of banking is absolute. *Augusta Bank* v. *Earle,* 13 Pet. (U. S.) 519; *Nance* v. *Hemphill,* 1 Ala. 551; *People* v. *Utica Ins. Co.,* 2 Johns. Ch. (N. Y.) 371; *People* v. *Utica Ins. Co.,* 15 Johns. (N. Y.) 358; *Perkins* v. *Smith,* 116 N. Y. 441, 23 N. E. Rep. 21. And, see *Ohio L. Ins., etc., Co.* v. *Merchants' Ins., etc., Co.,* 11 Humph. (Tenn.) 1; *State* v. *Williams,* 8 Tex. 255. See, also, *State* v. *Stebbins,* 1 Stew. (Ala.) 299; *People* v. *Bartow,* 6 Cow. (N. Y.) 290."

We also quote from Vol. 7 of American Jurisprudence, Par. 9, page 30:

"Banks are indispensable agencies through which the industry, trade and commerce of all civilized countries and communities are carried on; the business which they transact, though for private profit, is of a preeminently public nature, and is, therefore, universally recognized as a proper subject of legislative regulation under the police power of the state. The power of the legislature in this regard is supreme, subject only to such limitations as are imposed by the fundamental law."

A portion of Paragraph 14, page 34, of the same volume of American Jurisprudence, reads as follows:

"The power of the sovereign authority to provide for the creation of offices and the appointment of officials designated to regulate and supervise the banking business within the jurisdiction of such sovereign authority is well recognized. An instance of this is the appointment of bank examiners for state or national banks. A further instance is the creation of the office of a bank commissioner, superintendent of banks, or other state officer who is invested with the power to take charge of a bank which is deemed to be in unsafe condition; or who is invested with the power to liquidate the bank, or appoint a liquidator, or apply to the court for the appointment of a receiver when the bank is deemed to be insolvent."

The third headnote of *Noble State Bank* v. *Haskill*, 219 U. S. 104, reads as follows:

"The police power of a state extends to the regulation of the banking business, and even to its prohibition except on such conditions as the state may prescribe."

The regulation of the banking business carries with it, not only the regulation of solvent banks, but the or-

derly liquidation of insolvent banks. The widespread closing of banks in Florida in the years 1929, 1930 and 1931, and the almost universal closing of banks in the United States during the year 1932 and the forepart of 1933, demonstrate conclusively that the regulation of banks, including the orderly liquidation of insolvent banks, is a necessary governmental function for the protection of individual depositors and the flow of commerce.

We reiterate that in our opinion no one can successfully argue that the supervision and control of banking are not essential governmental functions, for they have long been recognized by the Federal Government and the various states as essential to the peace, prosperity and convenience of their citizens.

The petitioner admits that the regulation of state banking institutions is an essential governmental function, but denies that the liquidation of state banks is an essential governmental function. He also maintains that because the expenses of liquidation are paid out of the assets and income of the insolvent institutions rather than by appropriation of public funds out of the state treasury, the liquidating of banks is akin to the conduct of a particular business enterprise. Under the Florida statutes, the supervision of solvent banks and the liquidation insolvent banks are placed in the hands of the comptroller. It is all one policy and system; you cannot take it apart and say that one is essentially governmental and the other is not. The federal government takes great care to see that banks are properly liquidated and it is done under the direction of the comp-

troller. The purpose is the same whether the bank be solvent or insolvent, namely, that the money of the citizens of the state and nation be properly protected. Public confidence would be greatly shaken and economic loss would follow if private individuals could make a contract with the directors and officers of an insolvent bank to liquidate the same.

If the payment of the liquidator's compensation from the assets of a closed bank makes the liquidation of that institution a private enterprise, by the same reasoning the payment of bank examiners from the income of solvent banks would make the job of bank examinations a business enterprise and not a governmental function.

The petitioner says that the Florida law permits Federal Deposit Insurance Corporation to liquidate an insolvent state bank, and for this reason the liquidation of banks is not an essential governmental function. We doubt very much if this Honorable Court would say that Federal Deposit Insurance Corporation is not an essential federal instrumentality, for we believe that all courts recognize it as such; it performs an essential governmental duty for the Federal Government. If the State of Florida desires to delegate to said corporation one of the state's essential governmental functions, it has a constitutional right to do so, but the mere delegation does not change the quality of the power delegated. The act delegating the power was not passed until 1937, while the respondent received his compensation in 1931 and 1932.

III.

The Source of the Compensation of Respondent Is Immaterial.

In the court below the petitioner laid great stress upon the fact that the source of respondent's compensation was from the assets of the closed banks; the argument being that the imposition of a tax upon the income of the respondent would not impose a direct burden upon the state. By "burden," we assume the petitioner means financial burden. We do not think the argument sound, for that is not the criterion applied under the decided cases.

For instance, in the State of Florida the clerk of the circuit court receives his compensation from fees collected from those having instruments recorded and others engaged in litigation. The litigants may be from states other than Florida and it is a well-known fact that much land is owned by residents of other states who pay the clerk of the court for recording their deeds (*infra*, p. 32). There are a great many other instances in the State of Florida where officers and employees are paid from fees not realized by general taxation. The state has seen fit to require in certain instances the recipient of a state service to pay a fee for said service; yet if the officers or employees receiving their compensations by means of fees rather than from general taxation should be taxed by the Federal Government, it would be an interference with an instrumentality of government. We therefore believe that the true test is whether the respondent is an officer or employee of the state engaged in an essential governmental function. We further believe that

where the phrase, "burden on the state," is used, as in some of the reported cases, it refers to an interference with state governmental instrumentalities rather than to any tax burden. In other words, if a person is an officer or employee of the state engaged in an essential governmental function, any attempt by the Federal Government to tax his compensation is an interference with the constitutional powers of the state, regardless of whether the compensation of such officer or employee is paid from general taxation funds or from fees collected by the state for services performed by its officers or employees.

> "This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."
>
> *Indian Motorcycle Company* v. *United States of America*, 283 U. S. 570.

In the case of *Western Union Telegraph Company* v. *Texas*, 105 U. S. 460, this Honorable Court held that a state excise on the transmission of telegrams was void as to messages sent by officers of the United States on public business, because the excise, although exacted only of the telegraph company, was, so far as it was based on government messages, a tax on the means employed by the United States in carrying its constitutional powers into effect.

In *Ambrosini* v. *United States,* 187 U. S. 1, this Honorable Court decided that bonds exacted by a municipal corporation of the State of Illinois as a condition to granting liquor licenses the issue of which was committed by the state to the municipal corporation could not be taxed by the United States, even though the tax was collected only from the licensees, because such a tax would burden the exercise of a function belonging to the State of Illinois and the municipal corporation in their governmental capacity.

The case of *Burnet* v. *Coronado Oil & Gas Company,* 285 U. S. 393, sustains the principle for which we contend. In that case the State of Oklahoma leased certain state lands to Coronado Oil & Gas Company, the revenue from which was used by the state for educational purposes. The lessee sold the oil and gas, but claimed exemption from income tax on the money received from said sales. This Honorable Court held that the maintenance of her schools by the State of Oklahoma was a governmental function and that to tax the lessee on income from the sale of the gas and oil would be an interference by the Federal Government with a state governmental function. We quote from pages 400 and 401 of the opinion:

> "Here the lease to the respondent was an instrumentality of the state for the purpose of carrying out her duty in respect to public schools. To tax the income of the lessee arising therefrom would amount to an imposition upon the lease itself."

In the above case there was no money burden upon the State of Oklahoma, for it received the rental pro-

vided by the lease, but there was, nevertheless, an interference with an instrumentality of the state. It can be argued that if the lessee had had to pay income tax it would have paid less to Oklahoma for the lease, thereby causing a monetary burden upon the state. It can be just as logically argued in the instant case that if bank liquidators are compelled to pay income tax on their compensation, the State of Florida might have to supplement the liquidators' compensation with money derived from general taxation.

In the recent case of *Brush* v. *Commissioner of Internal Revenue*, 300 U. S. 352, the salary of the chief engineer of the Bureau of Water Supply of the City of New York was held exempt from federal taxation. Although the case does not so state, undoubtedly the salary was paid out of receipts secured from the citizens of New York City from the sale of water and not from general taxation. No mention is made as to the source of the engineer's salary, but it is decided squarely upon the point that the water system of New York is conducted in the exercise of the city's governmental functions and that therefore fixed salaries and compensation paid to its officers and employees are immune from federal taxation.

> "Thus, the employment of officers who are agents to administer its laws (*Collector* v. *Day, supra*; *Dobbins* v. *Erie County*, 16 Pet. 435, 10 L. Ed. 1022), its obligations sold to raise public funds (*Weston* v. *Charleston*, 2 Pet. 449, 467, 7 L. Ed. 481, 487; *Pollock* v. *Farmers' Loan & T. Co.*, 157 U. S. 429, 585, 586, 39 L. Ed. 759, 820, 821, 15 Sup. Ct. Rep. 673), its invest-

ments of public funds in the securities of private corporations, for public purposes (*United States* v. *Baltimore & O. R. Co.*, 17 Wall. 322, 21 L. Ed. 597), surety bonds exacted by it in the exercise of its police power (*Ambrosini* v. *United States*, 187 U. S. 1, 47 L. Ed. 49, 23 Sup. Ct. Rep. 1, 12 Am. Crim. Rep. 699), are all so intimately connected with the necessary functions of government, as to fall within the established exemption; and when the instrumentality is of that character, the immunity extends not only to the instrumentality itself but to income derived from it (*Pollock* v. *Farmers' Loan & T. Co.*, and *Gillespie* v. *Oklahoma*, *supra*) and forbids an occupation tax imposed on its use (*Choctaw, O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 59 L. Ed. 234, 35 Sup. Ct. Rep. 27; and see *Dobbins* v. *Erie County*, *supra*)."

Metcalf and Eddy v. *Mitchell* (*supra*).

Section 6101, C. G. L. of Fla. Supp. (*infra*, p. 31), provides for the assessment of each state bank examined by a state bank examiner. This money is put into the state treasury and the bank examiner is paid by a warrant drawn by the comptroller on the state treasurer.

See Section 6100, C. G. L. of Fla. Supp. (*infra*, p. 30).

The bank examiners are therefore paid by assessment upon the banks examined. In the case of insolvent banks, an assessment is made upon the assets of the insolvent banks to pay the cost of liquidation. All collections made by liquidators are put into the state treasury and kept in a spe-

cial fund. The liquidator is paid by warrant of the comptroller drawn on the state treasurer. The source of the bank examiner's compensation is from solvent banks and is no financial burden upon the state. We doubt, however, if the compensation of state bank examiners is taxed by the Federal Government. National bank examiners are paid in the same manner and we doubt if any state attempts to collect an income tax from a national bank examiner.

In the case of *People of the State of New York* v. *Graves*, 299 U. S. 401, the compensation of the general counsel for the Panama Railroad Company was held exempt from taxation by the State of New York on the ground that the Panama Railroad Company was a wholly owned instrumentality of the United States, engaged in maintaining, operating and protecting the Panama Canal. The railroad company utilized its ships and railroad to carry private freight and passengers; it also maintained a dairy and hotels and therefore had an income. No point is made as to whether the compensation was paid from general taxation or from the receipts of the railroad company; the decision was placed squarely upon the ground that the attorney was an officer or employee of an essential governmental instrumentality.

In the case of *Mallory* v. *White*, 8 Fed. Supp. 989, the compensation of a pathologist in Boston City Hospital, who was subject to the control of hospital trustees and whose salary was paid by the city, was held not subject to federal income tax as he was an employee of the city.

In that case part of the expenses of running and maintaining the hospital were paid from money received from pay patients.

In *Commissioner of Internal Revenue* v. *Ten Eyck*, 76 F. (2d) 515, the salary of the chairman of Albany Port District Commission was held exempt from federal income tax on the ground that he was an officer or employee of the State of New York engaged in an essential governmental function. The opinion does not state the source of the chairman's salary, but undoubtedly it was paid from fees charged by Albany Port District Commission for the use of the port. In the instant case respondent's compensation was paid from fees or taxes levied by the State of Florida upon the assets of the insolvent banks which the respondent liquidated.

We think the true rule as extracted from the many decisions of this Honorable Court involving taxation by the Federal Government is that a truly state governmental function or instrumentality cannot be interfered with by taxing the income of the officer or employee performing said function or making said instrumentality effective. A tax upon the performer of an essential governmental function is in reality a tax upon the function.

IV.

Article 643 of Treasury Regulations 74 and Article 643 of Treasury Regulations 77 Show Administrative Recognition of the Respondent's Contention.

While a treasury regulation cannot give exemption where none exists without it and cannot take away an exemption otherwise existing, it is nonetheless true that administrative recognition of a particular claimed exemption is sometimes very persuasive of the propriety

of the exemption. We must submit that Article 643 of Treasury Regulations 74 and 77 is an administrative interpretation of the income tax law which coincides with the claim of the respondent. Said article provides that compensation paid to state officers and employees by a state for services rendered in connection with the exercise of an essential governmental function of the state are not taxable. Said article defines an officer as one who occupies a position in the service of the state, the tenure of which is continuous and not temporary and the duties of which are prescribed by law and regulations and not by agreement. The same article defines an employee as one whose duties consist in the rendition of prescribed services and not in the accomplishment of specific objects, and whose services are continuous, not occasional or temporary.

The respondent in this case was paid by the State of Florida by vouchers signed by the comptroller and the treasurer; he occupied a position in the service of the state; his duties were prescribed by statute and we do not think that said duties were temporary. He was appointed in 1930, and devoted all of his time to his office, with the exception of attending an occasional directors' meeting of a bank in Ocala, Florida, until the end of 1932.

CONCLUSION.

The record and the cases heretofore cited show that respondent was an officer or employee of the State of Florida engaged in an essential governmental function. This being true, it is immaterial from what fund his compensation was paid, so long as it was paid by the State of Florida. Therefore the decision of the United States Circuit Court of Appeals should be affirmed.

Respectfully submitted,

H. M. VOORHIS,
Attorney for Respondent.

December, 1937.

APPENDIX.

6102. (4162.) COMPTROLLER MAY APPOINT LIQUIDATOR; DUTIES OF LIQUIDATOR; NOTICE TO BANK OFFICERS; CONFIRMING APPOINTMENT.—On becoming satisfied, from the reports furnished to him by a State bank examiner, or upon other satisfactory evidence thereof, that any bank, banking firm, banker, banking or trust company, or corporation doing business in this State under the State laws, has become insolvent and is in default, or that the affairs of any bank, banker, banking firm or trust company or corporation doing business in this State, under such State laws, is in an unsound condition, or threatened with insolvency because of illegal or unsafe investments, or that its liabilities exceed its assets, or that it is transacting business without authority of law or in violation of law, or if the directors of any bank, banking or trust company, or corporation, or any banker or the management of any banking firm doing business in this State under the State laws, shall knowingly violate, or knowingly permit any of its officers, agents, or servants to violate any of the provisions of law relative to such bank, bankers, banking firms, banking or trust companies, or corporations doing business in this State, the rights, privileges and franchises shall be subject to be forfeited, and the State Comptroller may in his discretion forthwith designate and appoint a liquidator to take charge of the assets and affairs of such bank, and require of him such bond and security as the

Comptroller deems proper, not exceeding double the amount that may come into his hands, and such liquidator shall be subject to dismissal by the Comptroller, whenever in his judgment such dismissal is deemed necessary or advisable; when one liquidator is dismissed, another may be duly designated and appointed. Such liquidator under the direction and supervision of the Comptroller, shall take possession of the books, records and assets of every description of such bank, banker, banking firm, banking and trust company, or corporation, and in his name shall sue for and collect all debts, dues and claims belonging to it, and upon the order of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such bank, bankers, banking firm, banking and trust company, or corporation, on such terms as the court shall direct; and may, if necessary, to pay the debts of such bank, banker, banking firm, banking and trust company, or corporation, sue for and enforce the individual liability of the stockholders. Such liquidator shall pay all money received by him to the State Treasurer to be held as a special deposit for the use and benefit of the creditors, subject to the order of the Comptroller, and shall also make quarterly reports to or when called upon, to the Comptroller of all of his acts and proceedings. The Comptroller, immediately upon appointing such liquidator, shall serve notice upon the president, or upon any vice president or cashier, or upon any director or other person having the charge or management of any such bank,

banker, banking firm, banking or trust company, or corporation, informing him or them in such notice of his action in appointing such liquidator, and notifying him or them or it that he would apply on a date therein named, not to exceed ten days from the date of service of such notice, to some circuit judge having jurisdiction over the same, for an order confirming his action and the appointment of a liquidator for such banking institution and such bank, banking firm, or banking or trust company, or corporation may, at such hearing, contest before such circuit judge the rightfulness and legality of such action of the Comptroller in appointing such liquidator. (Ch. 6807, Acts May 27, 1915, Par. 1; Ch. 13576, Acts 1929, Par. 19), C. G. L., Florida Supp.

6105. (4164) EXPENSES OF LIQUIDATION; COMPENSATION OF LIQUIDATORS; DISPOSITION OF BANK'S FUNDS.—All expenses of any liquidation shall be paid out of the assets of such bank, banker, banking firm, banking or trust company, or corporation, before distribution of the proceeds thereof. The compensation of the liquidator shall be fixed by the Comptroller, and shall be based upon the amount of work actually necessary and performed, and shall in no case exceed five per cent. of the cash collections. From time to time, after full provisions having first been made for the expenses of the liquidating agency, and the payment of liens for taxes and preferred claims, the Comptroller shall make ratable dividend of the money in the hands of the State Treasurer on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such bank, banker, banking

firm, banking or trust company, or corporation, are paid over to the liquidator, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, after all claims have been paid, shall be paid over to the shareholders, of such bank, banker, banking firm, banking or trust company, or corporation, or their legal representatives in proportion to the stock by them respectively held, or their interest therein as appearing. (Ch. 6807, Acts May 27, 1915, Par. 3; Ch. 13576, Acts 1929, Par. 21), C. G. L., Florida Supp.

6107. (4166) LIQUIDATORS UNDER SUPERVISION OF COMPTROLLER.—The provisions of this Article shall apply to all receivers of any bank, banking firm, or banking or trust company, heretofore appointed by the order of any circuit court, and all such receivers, both those hereunder and those heretofore appointed by the Circuit Court, shall at all times be under the supervision and control of the Comptroller, and subject at all times to summary discharge and dismissal by him and any vacancy in such receivership may be filed by the Comptroller at any time. (Ch. 6807, Acts May 27, 1915, Par. 6; Ch. 13576, Acts 1929, Par. 23), C. G. L., Florida Supp.

191. GENERAL GROUNDS FOR APPOINTMENT OF RECEIVER.—Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in Section 94, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a cer-

tificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in Section 192 (June 30, 1876, c. 156, Par. 1, 19 Stat. 63) Title 12, USCA.

192. DEFAULT IN PAYMENT OF CIRCULATING NOTES.— * * * Such receiver, under the direction of the comptroller shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings. Title 12, USCA.

235. AUTHORITY OF GOVERNOR TO DIRECT MAKING OF AUDIT. EMPLOYMENT OF EXTRA ACCOUNTANTS.—The Governor shall have and is hereby given the authority, when in his judgment it shall be necessary, to designate and direct any one or more of the auditors provided for in this Article to audit the office, books and records of any

county, of any State or county officer, or of any State institution, board or commission. The Governor shall also have the power and authority, if in his judgment it shall become necessary, to employ not exceeding two expert and efficient accountants, in addition to the auditors provided for in this Article, to make a special audit of any State department, State or county office, State institution, board or commission. Such additional or emergency auditors or accountants shall receive such compensation as shall be agreed on before the service is performed. (Ch. 12279, Acts 1927, Ch. 9.) C. G. L. of Florida, 1927.

6100. (4160.) COMPENSATION AND TRAVELING EXPENSES OF EXAMINERS.—The person employed by the Comptroller as bank-report analyst shall receive compensation at the rate of three thousand eight hundred dollars per annum; chief bank examiner, three thousand two hundred fifty dollars per annum and every other person employed by the Comptroller as bank examiner shall receive compensation at the rate of three thousand dollars per annum, and actual traveling expenses, while in the discharge of their duties. The Comptroller shall audit the accounts for traveling expenses of such examiners incurred in the discharge of such duties and shall draw his warrants on the State Treasurer for the amount due for such salaries in monthly payments and the expenses in monthly payments, and the warrants so drawn shall be paid by the State Treasurer, and an amount sufficient to pay such warrants for salaries and expenses is hereby appropriated. (Ch. 5687, May 29, 1907, Par. 2;

Ch. 6427, June 7, 1913, Par. 2; Ch. 10037, Acts 1925, Par. 2; Ch. 13576, Acts 1929, Par. 15; Ch. 15720, Acts 1931, Extra. Sess., Par. 1.). C. G. L., Florida, Supp.

6101. (4161) EXAMINATIONS OF BANKS AND TRUST COMPANIES; EXAMINATION FEES.—Each bank, banking firm, banking company, trust company and liquidating agency, doing business in the State of Florida, except national banks, shall be examined at least twice in each year by the State Comptroller or his agent, and oftener if deemed necessary: Provided however, that the State Comptroller may accept in his discretion in lieu of an examination authorized by the laws of this State a copy of the examination report that may have been made within a reasonable period by the Federal Deposit Insurance Corporation: and Provided further that the State Comptroller may furnish to the Federal Deposit Insurance Corporation or its representative a copy of all examinations made of any such banking institutions, and for each examination so made by the State Comptroller each bank, banker, banking firm, banking company, or trust company shall pay into the State treasury an examination fee based upon the resources of each bank or trust company as follows:

With resources up to one hundred fifty thousand dollars, twenty dollars.

With resources up to two hundred fifty thousand dollars, twenty-five dollars.

With resources up to four hundred thousand dollars, forty dollars.

With resources up to five hundred thousand dollars, fifty dollars.

With resources up to seven hundred fifty thousand dollars, seventy-five dollars.

With resources up to one million dollars, one hundred dollars.

And for each additional million or major part thereof, twenty-five dollars per million.

Examination fees shall in all cases be paid by the bank, banker, banking firm, banking or trust company, direct to the State Treasurer.

Within thirty days after each such examination made by the Comptroller, the Comptroller shall notify the bank, banker, banking firm, banking or trust company, so examined and the State Treasurer of the amount due in each case and if such examination fees are not paid within sixty days after such notification, the State Treasurer shall report to the Comptroller, and the bank, banker, banking firm, banking company or trust company, so failing to pay each such examination fee shall then be held and deemed to be in default of section 6102 (Ch. 5687, May 29, 1907, Par. 6; Ch. 6427, June 7, 1913, Sec. 1; Ch. 10037, Acts 1925, Par. 3; Ch. 13576, Acts 1929, Par. 16; Ch. 16795, Acts 1935, Par. 1), C. G. L., Florida Supp.

4867. (3084.) As Clerk or Recorder.—The compensation of the clerk of the various courts of records and the clerks of the circuit court as recorder shall be entirely by fees and shall be as follows:

Arraignment of prisoner	$ .25
Appearance of defendant, entering	.15
Attachment, issuing	.50
Attachment for witnesses	.50

Bond, approving	1.00
Capias, issuing	.75
Certiorari, issuing	.75
Commission to take testimony, issuing	1.00
Commissioners, instruction to, issuing	.50
Copying any record or paper, first one hundred words	.25
Each additional one hundred words and fraction thereof	.12½
Costs, taxing	.25
Deed, taking acknowledgment of	.50
Docketing cases in bench or bar dockets at each term, each	.15
Dower, taking relinquishment of	.50
Entering other matters required in the records of courts (except as herein otherwise provided), for the first one hundred words or less	25, etc.